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No. 356

In the Supreme Court of the United States

October Term, 1932.

INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Petitioner,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

BRIEF OF RESPONDENT.

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INDEX.

PAGE

THE OPINION OF THE COURT BELOW 2

JURISDICTION 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

Point A. Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market 9

Point B. As to persons or corporations which serve as agencies of government, and also engage on their own account in business for gain, it is well settled that immunity does not extend to their private property or to their use or enjoyment of it, but only to their operations or acts as such agencies 15

Point C. The implied immunity of one government, either national or state, from taxation by the other should not be enlarged so as to give undue advantages to persons or corporations operating for profit, at the expense of the state and without corresponding benefit to the national government 20

Point D. The bearing of this tax on government operations is too indirect and remote to be regarded as an interference with congressional power. The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government 23

Point E. The tax in question is in no sense an occupation or privilege tax, nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch* v. *Maryland* 28

CONCLUSION 33

APPENDIX I—Stipulation and agreed statement of facts 34

APPENDIX II—Section 8, article X, of the Constitution of Oklahoma; Compiled Oklahoma Statutes, Secs. 9574, 9627, 9666, 9814, 9960 38

AUTHORITIES CITED.

	PAGES
Act of Congress of February 13, 1925, Sec. 8	2
Board of Equalization of Tulsa County v. Indian Territory Illuminating Oil Co., 13 P. (2d) 585,	2
Burnett v. Coronado Oil & Gas Co., 285 U. S. 392, 398	28
Catholic Missions v. Missoula, 200 U. S. 118	25
Choctaw O. & G. R. R. Co. v. Harrison, 235 U. S. 292	28, 29, 30
Constitution of Oklahoma, Art. X, Sec. 8	38
C. O. S. 1921, Secs. 9574, 9627, 9666, 9814, 9960	8
Dyer v. Melrose, 215 U. S. 594	22
Educational Film Corporation v. Ward, 282 U. S. 379	21
Forbes v. Gracey, 94 U. S. 762	10
Fox Film Corporation v. Doyal, 286 U. S. 123, 128	14, 30
Gillespie v. State, 259 U. S. 501	28, 29, 32
Group No. 1 Oil Corporation v. Bass, 282 U. S. 279	13, 14, 17, 26, 27
Henderson Bridge Co. v. Kentucky, 166 U. S. 150	24
Hibernia Society v. San Francisco, 200 U. S. 310	22
Indian Motocycle Co. v. United States, 283 U. S. 570	12, 24
In re Protest of Bendelari, 82 Okl. 97, 198 Pac. 606	9
In re Skelton Lead & Zinc Co., 81 Okl. 134, 197 Pac. 495	9
Jaybird Mining Co. v. Weir, 271 U. S. 609	7
Marland v. United States, 53 F. (2d) 907	32
McCulloch v. Maryland, 4 Wheat. 316, 436, 4 L. ed. 579 608	17, 19, 23, 28
McIntosh v. Aubrey, 185 U. S. 122	22
Metcalf v. Mitchell, 269 U. S 514	20, 24
N. Y. Lake Erie R. R. v. Pennsylvania, 158 U. S. 431	24
Rust Land Co. v. Jackson, 250 U. S. 71	3
Rules of the Supreme Court, Rule 38, paragraph 2	2
South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261	14
Susquehanna Power Co. v. State Tax Commission, 283 U. S. 291	11, 21
Thomas v. Gray, 169 U. S. 264	24
Thompson v. Union Pacific R. R. Co., 9 Wall. 579, 19 L. ed. 792, 798	27-28
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 418	3
Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787, 792, 793	15, 21
Wagoner v. Evans, 170 U. S. 588	25
Weston v. Charleston, 2 Pet. 466, 7 L. ed. 481, 488	25
Western Union v. Mass, 125 U. S. 530	21
Wheeler Lumber Co. v. United States, 281 U. S. 572	24
Willcuts v. Bunn, 282 U. S. 216	24, 31, 32

IN THE SUPREME COURT OF THE UNITED STATES.

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INDIAN TERRITORY ILLUMINATING OIL COMPANY, A CORPORATION, *Petitioner,*

vs.

BOARD OF EQUALIZATION OF TULSA COUNTY, OKLAHOMA, *Respondent.*

BRIEF *of* RESPONDENT.

May It Please the Court:

Petitioner has heretofore filed its brief in support of papers whereon its petition for writ of *certiorari* was allowed. Inasmuch as no brief has been filed following the order allowing the writ we assume that the brief heretofore filed will be taken as petitioner's brief at this time and herewith respectfully submit our brief in response thereto.

I.

The Opinion of the Court Below.

The opinion of the court below has not yet been officially reported. The opinion of the Supreme Court of Oklahoma is unofficially reported in *Board of Equalization of Tulsa County* v. *Indian Territory Illuminating Oil Co.*, 13 P. (2d) 585. The opinion is dated May 17, 1932 (R. 28).

II.

Jurisdiction.

Section 8 of the Act of Congress of February 13, 1925, provides in part as follows:

> "That no * * * writ of *certiorari*, intended to bring any judgment or decree before the Supreme Court for review, shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of *certiorari* to the Supreme Court of the Phillippine Islands may be granted where application therefor is made within six months; *provided*, that for good cause shown either of such periods for applying for a writ of *certiorari* may be extended not exceeding sixty days by a justice of the Supreme Court."

Paragraph 2, Rule 38, Rules of the Supreme Court, provides:

> "The petition will be deemed in time when it, the printed record, and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925."

The Supreme Court of the United States has held that it has no power to review by *certiorari* a final judgment or

decree of either a state or a federal court after the expiration of the period fixed by statute.

—*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418;

Rust Land Co. v. *Jackson*, 250 U. S. 71.

The date of the judgment to be reviewed is May 17, 1932 (R. 37). The transcript of the record of the Supreme Court of Oklahoma, including all the appeal papers, was lodged in the office of the clerk of this court on September 8, 1932 (R. 47), more than three months after May 17, 1932, the date of the judgment to be reviewed, and more than three months after June 7, 1932, the date petition for rehearing was denied. They were, therefore, filed out of time and the writ of *certiorari* should not be entertained.

III.

Statement of the Case.

This case, in the courts below, was submitted upon a stipulation and agreed statement of facts (R. 18 to 29), attached hereto as an appendix at page 34. This stipulation and agreed statement of facts discloses the following material facts:

1. That the four tanks in question contained on January 1, 1929, approximately 172,747 barrels of oil produced by petitioners from producing leasehold estates located in Seminole County, Oklahoma, which were:

(a) Commercial leasehold estates on which no restrictions of any nature had been imposed; and,

(b) Restricted leasehold estates.

2. That of the oil produced by petitioner and stored in the four tanks, 51,630 barrels of said oil was produced by petitioner from "restricted leasehold estates," this being the oil which petitioner seeks to be exempted from ad valorem tax.

3. That said oil was produced during the period from March 31, 1927, to June 16, 1927, and commingled and intermingled at the time and place of production with oil from the "commercial leasehold estates" in Seminole County, Oklahoma, and piped into storage tanks owned by petitioner located in Tulsa County, Oklahoma, where it has remained in storage since 1927.

4. That the taxing officials have no way of determining or knowing the oil produced from "restricted leaseholds" as distinguished from that produced from "commercial leaseholds."

5. That the oil from the "restricted leasehold estates," comprises approximately 30% of the entire amount of the oil produced and stored as determined by gauges at the wells.

6. That the tanks in which this oil was stored are not on any of the leaseholds from which any of the oil was produced but are a distance of fully 75 miles from the place of production.

7. That under the terms of the departmental lease, copy of which is attached to the stipulation as Exhibit "A" and appears in the record (R. 21), lessee paid, or caused to be paid to the Superintendent of the Five Civilized Tribes,

Muskogee, Oklahoma, for the said lessors as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said payment being made at the time of removal of the oil. That said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by petitioner.

8. That of the oil produced on the "commercial leasehold estates" a gross production tax had been paid by petitioner as provided by section 9814, C. O. S. 1921, but that on all oil produced from the "restricted leasehold estates" no gross production tax had been paid.

IV.

Summary of the Argument.

Point A.

Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market.

Point B.

As to persons or corporations which serve as agencies of government, and also engage on their own account in business for gain, it is well settled that immunity does not extend to their private property or to their use or enjoyment of it, but only to their operations or acts as such agencies.

Point C.

The implied immunity of one government, either national or state, from taxation by the other should not be enlarged so as to give undue advantages to persons or corporations operating for profit, at the expense of the state and without corresponding benefit to the national government.

Point D.

The bearing of this tax on government operations is too indirect and remote to be regarded as an interference with congressional power. The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government.

Point E.

The tax in question is in no sense an occupation or privilege tax, nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch v. Maryland.*

ARGUMENT.

Petitioner relies on the case of *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609. Examination of that case discloses that it involves an entirely different state of facts than exist here. In the *Jaybird* case the ore sought to be taxed was mined from land owned by a restricted Indian and at the time it was attempted to be assessed for taxation such ore was in bins at the mine and on the property where it was produced, a veritable part of the mining operations. It was assessed on the ores in mass and the royalties or equitable interests of the Indians had not been paid or segregated. This is so for the court says:

> "The amount sued for is an ad valorem tax assessed by the county officials under Sec. 9814, Compiled Statutes (Okla.) of 1921, on lead and zinc ores mined by the company in 1920, and which were in its bins on the land January 1, 1921. This tax is in addition to a gross production tax paid to the state auditor. It was assessed on the ores in mass; and the royalties or equitable interests of the Indians had not been paid or segregated."

And also:

> "In this case the lease was made to secure the development of the lands and obtain for the benefit of the restricted Indian owners a percentage of the gross proceeds of the ores to be mined. The ad valorem tax here in controversy was assessed on the ores in mass at the mine before sale, and that was an attempt to tax an agency of the federal government within the principle of the cases cited."

This language used by the Supreme Court certainly means something and cannot be facetiously disregarded. We interpret it to mean that the interests of the lessor and the lessee were so inseparable that a tax of the one would burden the other. It is for that reason that the *Jaybird* case is distinguishable from the case at bar.

In the case at bar the oil belongs exclusively under the stipulated facts to the lessee. The Indian's portion had been paid at the time of removal of the oil. It is in lessee's possession, stored in its own tanks approximately 75 miles from where it was produced, with the interests of the lessor entirely segregated therefrom.

Also it is to be noted that the tax sought to be imposed in the *Jaybird* case was that of January first following the year in which the ore was produced, with the gross production tax paid, while in the case at bar the tax is that of two years subsequent to the year of production with the gross production tax not paid. Can it be said that this alleged exemption exists where the gross production tax has not been paid, and continues beyond the year of production and indefinitely year after year until the stored oil is sold?

Both the constitution of the state, section 8, article X, and the statutes, sections 9574, 9627, 9666, 9814, and 9960, C. O. S. 1921 (see appendix, p. 38) contemplate that all property in the state shall bear its just proportion of taxes, and that is what we contend here. We seek to require a visible, tangible and very valuable class of property, found with the great mass of property of the state and from which has been excluded the Indian's portion, to bear its just burden

of ad valorem taxation along with other property of the state of the same class.

The Oklahoma Supreme Court in *In re Skelton Lead & Zinc Co.*, 81 Okl. 134, 197 Pac. 495, held:

> "A state has inherent power to raise necessary revenue for state government; hence it has power to impose an ad valorem tax upon all property which must look to the state for protection and which the state is obliged to protect."

See also *In re Protest of Bendelari*, 82 Okl. 97, 198 Pac. 606.

Point A.

Petitioner ceased to function as a federal agency when it removed the oil from the lease, paid the Indian, commingled the oil with other oil, piped it to another county and there held it in storage for a period of years, presumably for a more advantageous market.

It will be noted at the outset that the lease (R. 22) provides:

> "The lessee hereby agrees to pay, or cause to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors as royalty, the sum of 12½ per cent of the gross proceeds of all crude oil extracted from said land, *such payment to be made at the time of the sale or removal of the oil* * * *." (Italics ours.)

Clearly that provision contemplates that any transactions that are had for the Indian shall be present transactions; that is to say that the Indian and the government has an interest or claim in the oil until it is removed from the lease,

but that upon removal the lessee shall make satisfactory settlement with the Indian, and this was done.

We assume that it may be said that as long as the oil remains upon the lease in an unsegregated state the government and the lessee are in a sense mining partners; that it is a joint adventure and that the government has a lien, or claim, or title in the oil, which of course, may not be taxed. And as inferred in the *Jaybird* case, the interests of the lessor and lessee are so inseparable that they may not be taxed because that would be in the nature of a tax on operations. But quite a different proposition prevails in the case at bar, where the Indian has been paid, the oil removed from the land, and in which the government no longer has any lien, claim or title. This, we submit, is in a sense covered in the case of *Forbes* v. *Gracey*, 94 U. S. 762, wherein the court said:

> "The moment mineral or ore becomes detached from the soil of the public lands in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine and extracted the ore.
>
> "It is then free from any lien, claim or title of the United States and is rightfully subject to taxation by the state as any other personal property is."

We think it may be safely assumed that the Indian Territory Illuminating Oil Company had this oil in storage along with some 120,000 barrels of other oil from unrestricted leases, holding it for more advantageous prices. Practically two years had elapsed since this oil was first stored, and

it is worthy of note, although not a matter of record in the case at bar, that there is now pending in the District Court of Tulsa County, three additional cases involving taxes for the years 1930, 1931 and 1932, on this same oil still in storage. That being the case, to what extent will this honorable court go in permitting property of this character to remain immune from state taxation? Will this honorable court, as it were, subsidize this company in its marketing transactions? No such privilege is accorded to other oil companies whose property is located in the State of Oklahoma, and who must pay an ad valorem tax upon their stored oil. And there is no evidence in the record that this company, in storing its oil for a period of years, was acting as a governmental agency.

This court, in the case of *Susquehanna Power Co.* v. *State Tax Commission,* 283 U. S. 291, says:

> "With that end in view the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice MARSHALL in *McCulloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. ed. 579, 608, and in *Osborn* v. *Bank of United States,* 9 Wheat. 738, 867, 6 L. ed. 204, 234. See *Union P. R. Co.* v. *Peniston,* 18 Wall. 5, 34-37, 21 L. ed. 787, 792-794. It has been followed without departure, and property so owned and used has uniformly been held to be subject to state taxation. *Thompson* v. *Union P. R. Co.,* 9 Wall. 579, 19 L. ed. 792; *Central P. R. Co.* v. *California,* 162 U. S. 91, 40 L. ed. 903, 16 S. Ct. 706; *Union P. R. Co.* v. *Pen-*

iston (18 Wall. 5, 34-37, 21 L. ed. 787, 792-794), *supra; Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375, 49 L. ed. 242, 25 S. Ct. 50, *supra; Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499; *Ackerlind* v. *United States,* 240 U. S. 531, 60 L. ed. 783, 36 S. Ct. 438; *Alward* v. *Johnson,* 282 U. S. 509, 51 S. Ct. 273; *Choctaw O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 65 L. ed. 1076, 41 S. Ct. 582; *Group No. 1 Oil Corp.* v. *Bass,* 282 U. S. 279, 51 S. Ct. 432, decided this day."

And to the same effect the case of *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, wherein the court says that:

> " * * * as to persons or corporations which serve as agencies of government, national or state, and also have private property or engaged on their own account in business for gain, it is well settled that the principle does not extend to their private property or private business, but only to their operations or acts as such agencies."

This, we think, is fundamental, that when a federal agency ceases to function in that capacity and its operations are designed to promote its own private advantages, its immunity from taxation ceases. We respectfully submit that that is the situation in the case at bar. The I. T. I. O. Company had ceased to function as a federal agency. It had entered the realm of speculator and adventurer, a situation in which the federal government was no longer concerned, and to which the government will not lend the helping hand of tax immunity. The lease contract does not contemplate that the lessee shall speculate in the markets at the expense

of the Indian. Then why should the government play longer with the lessee and say to it, You pay the Indian, remove the oil where you please, hold it as long as you please, and we will protect you against state taxation?

The case of *Group No. 1 Oil Corporation* v. *Bass,* 282 U. S. 279, bears out this same contention, wherein the court says:

> "Property sold or otherwise disposed of by the government, either state or national, in order to raise revenue for government purposes, is in a broad sense a government instrumentality, with respect to which neither the property itself before sale, nor its sale by one government, may be taxed by the other. *But it does not follow that the same property in the hands of the buyer, or his use or enjoyment of it, or the income he derives from it, is also tax immune. New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed. 693, 48 S. Ct. 374; *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. ed. 313, 14 Mor. Min. Rep. 183; *Tucker* v. *Ferguson,* 22 Wall. 527, 22 L. ed. 805. See *Weston* v. *Charleston,* 2 Pet. 449, 469, 7 L. ed. 481, 488." (Italics ours.)

It is worthy of note at this point that the I. T. I. O. Co., as quickly as possible paid off the Indian and eliminated him from further consideration. In other words the Indian was paid on the basis of the present market, for the oil company, no doubt, had its own ambitions with respect to future markets and did not care to be hampered in its operations with any interest that the Indian or the government might have in the oil. This, we think, is fairly indicative of the speculative purposes that the oil company had in mind. There can be no escape from the fact that the I. T.

I. O. Co., elected to store the oil for a better market to its own enrichment and enjoyment.

This same case, *Group No. 1 Oil Corporation* v. *Bass,* refers to what appears to be a controlling case, *i. e., South Carolina* v. *United States,* 199 U. S. 437, 50 L. ed. 261, wherein it was held that a state that engages in a private business may be taxed by the federal government for the reason that the thing in which the state was engaged was not governmental. So in the case at bar, the storing of oil for a period of years is a private business and is not governmental and is not done as an agency of the government.

In the recent case of *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 128, the court says:

> "The principle of immunity from state taxation of instrumentalities of the federal government, and of the corresponding immunity of state instrumentalities from federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland,* 4 Wheat. 316, 436, 4 L. ed. 579, 608), and the immunity does not extend '*to anything lying outside or beyond governmental functions and their exertions.*' *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576, 576, 579, 75 L. ed. 1277, 1281, 1282, 51 S. Ct. 601. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' (*Johnson* v. *Maryland,* 254 U. S. 51, 55, 56, 65 L. ed. 126, 128, 129, 41 S. Ct. 16), but it does not exist '*where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.*' *Willcuts* v. *Bunn,* 282 U. S. 216, 225, 75 L. ed. 304, 306, 71 A. L. R. 1260, 51 S. Ct. 125."

"* * * The disposition by the government of public lands, in order to advance the general interest by promoting settlement, illustrates the principle and its limitation. The property of the United States is not subject to state taxation * * * but the property of individual owners, although derived from the United States under its public land laws, may be taxed. The power to tax exists as soon as the ownership is changed. * * * Though the legal title remains in the government, if the proceedings *have reached the point where nothing more remains to be done* by the entryman *and the government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land is subject to taxation.*"

"* * * It is thus apparent that the mere fact that a property right is created by statute to fulfill a governmental purpose does not make it non-taxable when it is held in private ownership and exercised for private advantage. See *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291, 297, 75 L. ed. 1042, 1047, 51 S. Ct. 434." (Italics ours.)

Point B.

This court has laid down the principle numerous times that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such agent.

As stated in *Union Pacific R. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787, 792:

"A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States."

And, further:

"Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch* v. *Md.*, and *Osborn* v. *Bk.*, 9 Wheat. 738, are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the general government may be subjected to state taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the state, and to be paid for on delivery, the stamp upon each note being proportioned in its denomination. The tax, therefore, was not upon any property of the bank, but upon one of its operations; in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the chief justice, to a tax paid by the real property of the bank in common with the other real property of the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the state. But this is a tax upon the operations of the bank and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a govern-

ment agent and a tax upon the operations of the agent acting for the government."

And the court in this same case makes the very appropriate observation:

> "But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments or agencies by which the United States carriers on its powers, it is impossible to see how it can be pertinent to inquire whence the property originated or from whom its present owners obtained it."

So in the case at bar it does not seem to be pertinent at this stage to inquire whence the property originated. It has become a part of the mass of property of the state. It is enjoying the protection of the laws of the state and the police powers of the state. May it continue indefinitely to be immune from state taxation because, perchance, it originated some two years back from a restricted Indian lease? We respectfully submit that such a contention is a complete departure from the rule announced by Chief Justice MARSHALL in *McCulloch* v. *Maryland,* and which has ever remained the guiding principle in these cases.

This honorable court in *Group No. 1 Oil Corporation* v. *Bass,* 283 U. S. 279, 282, 283, said:

> "This court has consistently held that, where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose. *New Brunswick* v. *United States,* 276 U. S. 547, 72 L. ed.

693, 48 S. Ct. 371; *Forbes* v. *Gracey,* 94 U. S. 762, 24 L. ed. 313; *Tucker* v. *Ferguson,* 22 Wall. 527, 22 L. ed. 805; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371, 32 S. Ct. 499, 56 L. ed. 801; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531, 537, 41 S. Ct. 582, 35 L. ed. 1076; *Central Pacific R. R. Co.* v. *California,* 162 U. S. 91, 125, 16 S. Ct. 766, 40 L. ed. 903; *Union Pacific Railroad Co.* v. *Peniston,* 18 Wall. 5, 35-37, 21 L. ed. 787; *Weston* v. *Charleston, supra,* page 468 of 2 Pet.

"Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction. * * *

"True, since restricted, allotted or tribal lands of Indians are instrumentalities of the federal government, it has been held that neither leases of the lands, *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779, nor gross income derived from them, *Choctaw, O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; see *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503, 38 S. Ct. 426, 62 L. ed. 1239; *Large Oil Co.* v. *Howard,* 248 U. S. 549, 39 S. Ct. 183, 63 L. ed. 416; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112; nor net income, *Gillespie* v. *Oklahoma,* 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338, may be taxed by a state. *But no case has extended such immunity to property, real or personal, or income derived from its sale, where it has passed to the buyer by a completely executed act of sale, without restriction, and no interest in it has been retained for the benefit of the Indians.* Whatever may be the

appropriate limits of the immunity, as implied in this class of cases, these limits are clearly exceeded by that asserted here." (Italics ours.)

That case is fairly analogous to the case at bar. In that case under the Texas law, title to the oil, by the lease, vested in the lessee before severance and was held to be taxable. Likewise, in the case at bar, title to the oil upon removal from the lease under the provisions of the departmental lease as well as under the stipulation and agreed statement of facts, vested absolutely in the lessee. We are unable to see any distinction.

Point C.

We believe we are safe in saying that it is the policy of this court not to extend or further enlarge the implied immunity of one government, either national or state, from taxation by the other.

Chief Justice MARSHALL, in *McCulloch* v. *Maryland, supra,* in no undecided terms laid down that principle when he said:

"If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which *leaves the pou r of taxing the people and property of a state unimpaired; which leaves to a state the command of its resources,* and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which

are given for the purpose of carrying those powers into execution." (Italics ours.)

With that rule as a guide this court has always protected the sovereign right of the state in its taxation of property within the state. In the case of *Metcalf* v. *Mitchell*, 269 U. S. 514, this court held that the earnings of consulting engineers engaged in advising states and municipal corporations were not exempt from income tax, and after discussing the principles underlying immunity from taxation, the court said:

> "When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. *Thompson* v. *Pacific Railroad*, 9 Wall. 579, 19 L. ed. 792; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 25 S. Ct. 50, 49 L. ed. 242; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 371, 32 S. Ct. 499, 56 L. ed. 801; *Fidelity & Deposit Co.* v. *Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. ed. 664; *Choctaw O. & G. R. R. Co.* v. *Mackey*, 256 U. S. 531, 41 S. Ct. 582, 65 L. ed. 1076.
>
> "As cases arise lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the rea-

son upon which the rule rests, and which must be the guiding principle to control its operation."

And in *Susquehanna Power Company* v. *State Tax Commission,* 283 U. S. 291, the court said:

"The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one, or the appropriate exercise of its functions by the other."

And in *Western Union* v. *Mass,* 125 U. S. 530, the court said:

"Agencies of the federal government are only exempt from state taxation so far as such taxation may interfere with or impair the agency in performing the functions by which they serve the government."

And in the case of *Educational Film Corporation* v. *Ward,* 282 U. S. 379, the court said:

"The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government."

And, as stated in *Union P. R. Co.* v. *Peniston,* 18 Wall. 5, 21 L. ed. 787, 793:

"It is, therefore, manifest that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, *but upon the effect of the tax;* that is, upon the question *whether the tax does in truth deprive them of power to serve the government as they were intended to serve*

> *it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect.* It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

In *Dyer* v. *Melrose,* 215 U. S. 594, it was held that the salary of a naval officer on deposit in a bank is not exempt from state taxation; likewise pension money, *McIntosh* v. *Aubrey,* 185 U. S. 122; likewise United States checks or orders issued for interest accrued upon registered bonds of the United States, where intended for immediate payment. *Hibernia Society* v. *San Francisco,* 200 U. S. 310. The court in *McIntosh* v. *Aubrey, supra,* says:

> "It is not that the pension money shall be exempt from attachment in all its situations and transmutations. It is only to be exempt in one situation, to-wit, when 'due or to become due.' From that situation the pension money of plaintiff in error has departed."

These cases, we submit, are fairly analogous to the case at bar in that they hold in principle that as long as there is a government function involved immunity from taxation will prevail, but that once that function ceases the privilege is withdrawn.

Certainly the sovereignty of the national government ends and the sovereignty of the state begins when an oil company ceases to operate as a producer and enters the realm of speculation. Here is an oil company claiming to be a federal instrumentality that has paid off its Indian lessor according to the terms of the lease, piped its oil from

the place of production to another county, holding it in storage, presumably speculating on the market and while seeking to hide behind the skirts of the national government, takes advantage of all the rights and benefits of the state law, civil and criminal, state police power, insurance laws and what not, year after year, and unwilling to share its burden of taxation. We say the principles as enunciated by Chief Justice MARSHALL in the *McCulloch* case do apply, and that the sovereign power of the state extends to the taxation of this property.

There is a clear distinction between the *means* employed by the government and the *property* of agents of the government in performance of contracts with the government. In *McCulloch* v. *Maryland, supra,* the court took pains to distinguish between the right of the State of Maryland to tax the *operation* of the National Bank and the paper issued by it and the tangible *property* of the bank, when it said that the state could tax the *property* held by the bank in common with all other property of the state although it might be burdensome, and that this can in no sense be considered an interference with the operation of an instrumentality of the government.

Point D.

Following out the principles enunciated above, the court has held in numerous instances that immunity will not be extended to those cases in which the bearing on governmental operations is too remote to be regarded as an interference with congressional power.

The court in *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, in referring to *Metcalf* v. *Mitchell,* 269 U. S. 514; *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572; and *Willcuts* v. *Bunn,* 282 U. S. 216, stated that these cases "are all distinguishable, for the taxes there in question were not laid on transactions involving an exertion of governmental functions and their bearing on governmental operations was so indirect as to place them outside the principle which is applicable here."

And in the case of *Thomas* v. *Gay,* 169 U. S. 264, the court said:

> "But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the Legislature of Oklahoma, at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.
>
> "But it is obvious that the tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privilege of the Indians."

And the court in that case refers to *N. Y. Lake Erie R. R.* v. *Pennsylvania,* 158 U. S. 431, and *Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150, where it was held that a tax on tolls was too indirect and remote to be regarded as

a tax or burden on interstate commerce, although it was in those cases contended that the tax might be supposed to increase the tolls, and, therefore, be a burden on interstate commerce. The court then says:

> "The unlimited power of Congress to deal with the Indians * * * may be conceded, but it is not perceived that local taxation by a state or territory, of property of others than Indians would be an interference with Congressional power.
>
> "The taxes in question here were not imposed on the business of grazing or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress."

See also *Wagoner* v. *Evans*, 170 U. S. 588, and *Catholic Missions* v. *Missoula*, 200 U. S. 118.

But it will be argued by petitioner that a tax imposed upon this oil in storage at any time prior to sale will affect the value of leases of this character and to that extent be a burden on the government in its dealings with the Indians. But Chief Justice MARSHALL, in the case of *Weston* v. *Charleston*, 2 Pet. 466, 7 L. ed. 481, 488, disposed of that argument, wherein he said:

> "It is admitted by counsel for defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight than if urged against its application * * * to lands sold by the United States. * * * When lands are sold, no connection remains between the purchaser and

> the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burden. * * * Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may be assumed is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans; it is no impediment to the power of borrowing, that the money when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold."

Paraphrasing the above and applying it to the case at bar we might say that the connection between the government and its instrumentality has been dissolved; that it is no burden on the Indian wards, and it is no impediment on the operations of the lease, that the oil, after the Indian's portion has been paid for, and the oil removed and commingled with other oil, and held in storage at the whim of the owner, loses its exemption from taxation, but a tax on the unsegregated oil on the lease, or a tax on the gross production, or a tax on the income from the lease stands on different principles from a tax on oil which is held in storage for a period of years and has entered the marts of trade.

And in the recent case of *Group No. 1 Oil Corporation* v. *Bass,* 283 U. S. 279, the court says:

> "Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government. We may assume that if the property is subject to tax after sale, the governmental

> seller will generally receive a less favorable price than if it were known in advance that the property in the hands of late owners, or even the buyer alone, could not be taxed."

So in the case at bar, if it were known in advance that immunity from taxation was to be extended to oil from restricted lands wherever shipped and however long stored, such inducement might conceivably affect the market value of such leases. Likewise, if the immunity were extended into the manufactured product many of these oil companies that are engaged in refining and manfacturing, as well as in production and marketing, would be attracted to such bounties. And, if immunity extend to oil removed from the lease and piped into other counties of the state and there held in storage, may it not also extend to oil piped to other states, or across the continent, or to the gulf or the seaboard?

But the court in *Group No. 1 Oil Corporation, supra,* says:

> "But the remote and indirect effects upon the one government of such nondiscriminatory tax by the other have never been considered adequate grounds for thus aiding one at the expense of the taxing power of the other."

If the immunity against state taxation be extended and enlarged in the case at bar, it is fair to presume that the same privileges will be demanded by state instrumentalities against federal taxation. As was stated by Chief Justice Chase in *Thompson* v. *Union Pacific R. R. Co.,* 9 Wall. 579, 19 L. ed. 792, 798:

"We perceive no limits to the principle of exemption which the complainants seek to establish."

And,

"The nature of the claims to exemptions which would be set up, is well illustrated by that which is advanced by the complainants in the case before us."

Point E.

The tax in question is in no sense an occupation or privilege tax. Nor is it an income or profits tax, but is a property tax sanctioned by this court since *McCulloch* v. *Maryland.*

Petitioner relies upon the case of *Gillespie* v. *State,* 259 U. S. 501, but that is a case in which the state sought to impose a tax on the net income derived by a lessee of restricted Indian lands. It has no application to a recurring tax such as the ad valorem tax which is applied each year the property remains on hand. Under the law there is some reason for exempting the income derived from a restricted source, but there is neither reason nor equity in exempting the stored oil of ad valorem tax year after year and indefinitely after all the elements of income have been eliminated from it.

The court in *Burnett* v. *Coronado Oil & Gas Co.,* 285 U. S. 392, 398, said:

"We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analogous to those which it disclosed."

Petitioner relies on *Choctaw O. & G. R. R. Co.* v. *Harrison,* 235 U. S. 292, wherein the railroad company as les-

see of certain coal mines sought to be relieved of a state gross revenue tax because it was operating as a government agency through which the United States was performing its duty to the Indians. In that case the court held that the gross revenue tax is an occupation or privilege tax which cannot be exacted from a federal instrumentality acting under congressional authority, but that is certainly not analogous to the case at bar.

In the course of the discussion in the *Choctaw R. R.* case, the court makes the statement:

> "But it is insisted that the statute, rightly understood, prescribes only an ad valorem imposition on the personal property owned by appellant —the coal at the pit's mouth—*which is permissible, according to many opinions of this court. Thompson* v. *Union P. R. Co.*, 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Central P. R. Co.* v. *California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. 340."

Thus recognizing the authority of the state to tax property of a governmental agency on an ad valorem basis.

In the case of *Gillespie* v. *State, supra,* the same principle was laid down by the court in passing on the right of Oklahoma to tax net income, when the court took the precaution to say:

> "*Whether this property could be taxed in any other form or not,* it cannot be reached as profits or income from leases as those here."

The court further says in the case of *Choctaw O. & G. R. R. Co.* v. *Harrison,* with respect to the gross production tax:

> "It is unnecessary to consider the power of the State of Oklahoma to treat coal dug from mines operated by the appellant as other personality and to subject them to a uniform ad valorem tax for it seems to us clear that the Acts of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis,' * * *. The requirement is not on account of property owned on a given day as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes. * * * A tax upon a merchant's, manufacturer's or miner's gross sales is not the same thing as one on his stock treated as property."

The gross production tax then is in the nature of an income or operations tax. But it is admitted by the stipulation that this tax was not paid. In refusing to pay the gross production tax petitioner elected to adopt that means of availing itself of its alleged exemption of income or operations tax for the year of production and we respectfully submit that it may not each recurring year continue to claim exemption on the theory of income.

In *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 128, the court said:

> "After the copyright has been granted the government has no interest in any action under it save the

general one that its laws shall be obeyed. Operations of the owner in multiplying copies, in sales, in performances or exhibitions, or in licensing others for such purposes, are manifestly not the operations of the government. A tax upon the gains derived from such operations is not a tax upon the exertion of any governmental function."

So in the case at bar, operations of the owner in storing oil beyond the year of production for more advantageous markets are not operations of government, and a tax on such oil is not a tax upon the exertion of any governmental function.

Willcuts v. *Bunn,* 282 U. S. 216, was a case in which the court upheld a federal income tax on profits realized from the sale of municipal bonds. The argument was there made that the tax was illegal because it was a direct tax on income derived from municipal securities, governmental in character. That is virtually the argument of counsel in the case at bar (brief, p. 28, *et seq.),* it being argued that, "If the income derived from the sale of the oil is immune, the oil from which the income is derived must necessarily be immune"—that immunity of one implies immunity of the other. But the court held otherwise in *Willcuts* v. *Bunn, supra.*

The court said:

"It is urged, however, that a federal tax on the profits of sales of such securities should be deemed, as a practical matter, to lay such a burden on the exercise of the state's borrowing power as to make it necessary to deny to the federal government the constitutional

> authority to impose the tax. No facts as to actual consequences are brought to our attention, either by the record or argument, showing that the inclusion in the federal tax of profits on sales of state and municipal bonds casts any appreciable burden on the state's borrowing power. We are left to the inadequate guidance of judicial notice."

That being the rule as applied to federal taxation of state instrumentalities is it not equally applicable to state taxation of alleged federal instrumentalities? Immunity of income does not mechanically and arbitrarily carry with it immunity of the oil irrespective of how long stored and irrespective of whether the tax casts any appreciable burden on the government.

In *Marland* v. *United States,* 53 F. (2d) 907, the Court of Claims, on the authority of *Willcuts* v. *Bunn,* upheld a federal tax on profits derived from the sale of oil and gas leases of state (Oklahoma) owned school lands, holding that the *Gillespie* case was not analogous.

And in the case at bar, we say it is one thing to tax property which, although derived from a non-taxable source, has become an indistinguishable part of the taxpayer's general property and quite a different thing to tax a person on account of his receipts of an income from such source. The former casts no direct or measurable burden upon the exempted lease and its operation because the income has been separated therefrom and no longer has any connection therewith, while the latter, it is held, directly burdens the lease and its operation.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

H. L. Anderson,
County Attorney of Tulsa County, Oklahoma;

Hugh Webster,
Tulsa, Oklahoma,
Counsel for Respondent.

APPENDIX 1.

In District Court of Tulsa County.

(Title omitted.)

Stipulation and Agreed Statement of Facts.

Filed Nov. 26, 1929.

Comes now the Indian Territory Illuminating Oil Company as appellant, by its attorneys, Fred M. Carter and C. E. Wilhite, and the Board of Equalization of Tulsa County, Oklahoma, as appellee, by the County Attorney of said county; and the said appellee reserving the right at the time of trial to move the dismissal of this appeal, and to demur to appellant's complaint, hereby stipulate and agree that if the court overrules appellee's motion to dismiss and its demurrer to appellant's complaint, the following (fol. 31) statement contains and shall constitute the statement of facts in the above entitled matter, and that the court may enter judgment accordingly the same as if such facts hereinafter recited had appeared from the evidence and testimony adduced in open court in due and regular manner upon the trial of said cause, the parties hereto reserving the right to except to the rulings, orders and judgment of the court:

1. That the Indian Territory Illuminating Oil Company is a corporation organized under the laws of the State of Delaware, existing and doing business under the laws of the State of Oklahoma, and engaged in the production and marketing of crude oil, and that for the purposes of this hearing the said Indian Territory Illuminating Oil Company, a corporation, shall be designated as appellant, and the Board of Equalization of Tulsa County, Oklahoma, designated as appellee.

2. That appellant, on the 8th day of April, 1929, in due time, prepared and filed with the County Assessor of

Tulsa County, Oklahoma, its assessment list or schedule, wherein was incorporated, among other items of property, the following, to-wit: 4 55,000-bbl. steel storage tanks; 51,630 bbls. crude oil, located in School District No. 22, Red Fork Township, Tulsa County, Oklahoma, and notation made in and on said return and as a part thereof, that appellant deemed said property exempt from taxation, and claimed exemption from taxation on said property in said county, by any ad valorem taxing agency within the State of Oklahoma.

3. That the claim of appellant relative to exemption from taxation of the storage tanks and crude oil above designated was by the County Assessor of Tulsa County, Oklahoma, denied and said assessor did, on the 8th day of April, 1929, add said property to the assessment list of property belonging to this appellant, and assessed the value of said property in the following sums, to-wit: 4 55,000-bbl. steel (fol. 32) storage tanks, $22,000.00; 51,630 bbls. crude oil, $51,081.10.

4. That on the 5th day of June, 1929, appellant appeared before the Board of Equalization of Tulsa County, Oklahoma, with the intent and for the purpose of having said property above described stricken from the assessment list of property belonging to appellant; that on said day said board heard and considered the evidence adduced by appellant and argument of counsel in support thereof, and did, upon consideration thereof, deny the claim of appellant, and sustained the action of the County Assessor of Tulsa County, Oklahoma, in placing said property on the assessment list of said appellant.

5. That appellant gave notice of appeal from the action and decision of the Board of Equalization of Tulsa County, Oklahoma, and that the County Assessor of Tulsa County, Oklahoma, as secretary of said board, pursuant to said notice of appeal, has certified the proceedings had and done before said board to this court.

6. That the storage tanks mentioned above and complained of herein, and on account of which appearance was had before the Board of Equalization and appeal therefrom lodged in this court, contained on January 1, 1929, approximately 172,747 bbls. of oil produced by appellant from producing leasehold estates located in Seminole County, Oklahoma, which were *(1)* commercial leasehold estates, which is to say, fee simple, or those on which no restrictions of any nature have been, or are now, imposed, or if imposed have been removed by the proper authority, and *(2)* restricted leasehold estates, which is to say, leases or lands owned by restricted Indians on which lands such restrictions have been, and are now imposed by Acts of Congress. But that except as advised by appellant, the assessor and the Board of Equalization of Tulsa County, Oklahoma, had no way of knowing from where or from what leases said oil was produced. That on the oil produced from the "commercial leasehold estates" a gross production tax has been paid by appellant, as provided by Sec. 9814, C. O. S. 1921; that on all oil produced from the "restricted leasehold estates" no gross production tax has been paid, this being the oil which appellant here seeks to be exempted from ad valorem tax in Tulsa County, Oklahoma; that the four storage tanks and the 51,630 bbls. of (fol. 33) crude oil above mentioned and involved herein were assessed for the year 1929 and subjected to a mill rate levy of 34.05 mills on the dollar valuation for state, county, school district and township taxes, but that no ad valorem tax has been paid thereon.

7. That of the oil produced by appellant and stored in the tanks above described, 51,630 bbls. of said oil was produced by appellant from lands located in Seminole County, Oklahoma, owned by Indians whose restrictions against alienation have never been removed, copy of the lease under which appellant operated and produced the oil herein involved, and of which lease appellant was assignee, is here-

to attached, marked "Exhibit A," hereby referred to and made a part hereof. But that except as advised by appellant, the assessor and Board of Equalization of Tulsa County, Oklahoma, has no way of knowing what amount of said oil in storage, if any, was produced by appellant from restricted leasehold estates. That said oil was produced during the period from March 31, 1927, to June 16, 1927, and commingled and intermingled at the time and place of production with oil from the "commercial leasehold estates" in Seminole County, Oklahoma, and immediately piped into storage tanks located in Tulsa County, Oklahoma, where it has remained in storage since 1927. That the oil from the restricted leasehold estate comprised approximately 30% of the entire amount of oil produced as determined by gauges at the wells.

8. That the steel storage tanks above mentioned are located in Tulsa County, Oklahoma, and became the property of appellant on the 14th day of March, 1927, and were acquired for the purpose of storing oil produced by it and such tanks are now, and were on January 1, 1929, owned by appellant. These tanks are not on any of the leaseholds from which any of the oil was produced, nor is it contended that they are on "restricted leasehold estates."

9. That pursuant to the terms of the departmental lease, copy of which is attached hereto as Exhibit "A," appellant as lessee paid or caused to be paid to the Superintendent of the Five Civilized Tribes, Muskogee, Oklahoma, for the said lessors, as royalty, the sum of 12½% of the gross proceeds of all crude oil extracted from said land, said (fol. 34) payment being made at the time of removal of the oil. That said Indians and lessors owned no part of the oil in storage on January 1, 1929, nor will they receive any part of the proceeds of same when sold or disposed of by appellant.

(Signatures omitted.)

(Exhibit "A," copy of lease, omitted.)

APPENDIX II.

Section 8, article X, of the Constitution of Oklahoma:

"All property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and any officer, or other person authorized to assess values, or subjects, for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of malfeasance, and upon conviction thereof shall forfeit his office and be otherwise punished as may be provided by law."

Compiled Oklahoma Statutes:

Section 9574. "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation. * * *"

Section 9627. "It shall be the duty of the township assessor of any township in which tanks or tank farms for storage of crude petroleum are located to assess as other property is assessed, to the proper owners of the fair cash value, as hereinbefore defined, any and all such tanks and the contents thereof. * * *"

Section 9666. "The county assessor shall on the 15th day of January of each year proceed to take a list of all taxable property in the county, and assess the value thereof as of January 1st. * * * "

Section 9814. "Oil in storage, asphalt and ores bearing minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property, within the taxing district in which such property is situated at the time."

Section 9960. "All taxable property shall be listed and assessed each year at its fair cash value, estimated at the price it would bring at a fair voluntary sale, in the name of the owner thereof on the first day of January of each year. * * *"